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SUPREME COURT, U.S.

NO. 98-480

In the Supreme Court of the United States

OCTOBER TERM, 1998

COMM-CARE CORPORATION

Petitioner,

v.

LOUISIANA TAX COMMISSION, et al.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF LOUISIANA

REPLY BRIEF FOR PETITIONER

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The reasons which warrant the grant of a writ are adequately stated in the petition. This reply will correct several erroneous assertions contained in the Brief in Opposition.

1. Respondents suggest that the constitutional question presented cannot be asserted in this Court because it was not raised in the original petition to the state district court. (Br. In Opp. p. 5). Generally a higher court will not consider a constitutional question unless it has been raised by the pleadings in the lower courts. But this rule does not apply in cases where the constitutional issue arises from a defendant's reliance on the subject statute to defeat a plaintiff's claim. *National Bank of Commerce in New Orleans v. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College,* 20 So.2d 264, (La. 1944). "If the law were otherwise a plaintiff would be without right to attack the constitutionality of a statute merely because it did not anticipate that the defendant would in its answer rely upon the provisions (or an interpretation) thereof as a defense to the action." *Id,* at 267. In this case, it is the state district court's interpretation of the statute, not the statute itself, which Comm-Care claims is unconstitutional. The constitutional issue did not surface until the state district court dismissed the action, and it was raised in the state court of appeal and in the state supreme court.

2. Respondents assert that *Triangle Marine v. Savoie,* 681 So.2d 937 (La. 1996) holds that a taxpayer can assert a legality challenge to a state tax (as here) pursuant only to R.S. § 47:2110 and that Comm-Care therefore erroneously proceeded under R.S. § 47:1989-1998, (Br. In Opp. p. 8). *Triangle Marine* holds that a taxpayer challenging the correctness of a tax assessment *must* proceed under

R.S. § 47:1989-1998, but a taxpayer asserting a legality challenge *may* proceed under *either* of *R.S.* § 47:1989-1998 *or* 47:2110. Respondents' arguments based on this erroneous interpretation must fall.

3. Respondents assertion that a state court may require timely payment to allow post-deprivation remedies (Br. In Opp. p. 6) and their argument that Comm-Care failed to comply with the Louisiana procedure (Br. In Opp. p 9-11) beg the question presented here: Whether the courts of a state, by reading additional requirements into procedural statutes, deny due process to taxpayers who comply with the statutes' facial requirements.

CONCLUSION

For the foregoing reasons, as well as those urged in the petition, certiorari should be granted.

Respectfully submitted,

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